derived from their sale by the authorities should be reverted back to the owners. As the owners cannot be found and that the plaintiffs are claiming to be one, the money should be returned to them.

Though it is an undenied fact that the vehicles were originally detained, they could be seized by the authorities at any time upon suspicion that an offence under s. 33 of the CVLB Act is contravened. Section 51 of the CVLB Act provides the authorities with the power to seize and as the suspected offence under s. 33 of the CVLB Act is clearly stated on both the notices to Kaju and Subas, the authorities can be implied to have seized the vehicles after their detention and have them subjected to forfeiture by the Magistrate under s. 51(3) of the CVLB Act.

As the Magistrate had exercised his discretion properly on the forfeiture on one of the vehicles so lawfully seized, this Court has to refuse the plaintiffs' 3rd prayer.

I shall now refer to the fourth prayer of the plaintiffs and, that is for a declaration that the plaintiffs have the right and/or possess an interest in both the aforesaid vehicles after being informed by the defendants subsequent to the seizure of the vehicles and/or before the vehicles were auctioned.

It is trite law that if the plaintiffs can prove that they are the legal owners of the said vehicles, they certainly have an inherent right to the same. This inherent right exists from the very moment they became owners and will only cease when their ownerships come to an end. Such rights do not depend upon before or after the plaintiffs were informed that the vehicles were seized and/or before one of them was auctioned. In view of this, I find that there is no necessity for this Court to grant the fourth prayer to the plaintiffs.

As for the fifth prayer, I shall dismiss the same for there is no damage done to the plaintiffs.

Based on the aforesaid, I hereby order that the plaintiffs summons-in-chambers (Enclosure 3) be dismissed with costs.

BORNEO HOUSING MORTGAGE FINANCE BERHAD

v.

THE PERSONAL REPRESENTATIVE OF THE ESTATE OF MAUREEN LEE LUN WAH (DECEASED) & ANOR.

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN J.
[SUIT NO. T 55 OF 1988]
30 NOVEMBER 1993

GUARANTEE: Action against guarantor - Contention of guarantor that plaintiff has failed to prove execution of guarantee - Execution of guarantee not specifically denied by guarantor - Rules of pleading - Effect of inclusion of guarantee document in Agreed Bundle of Documents - Whether guarantor is entitled to the benefit of any term in the loan agreement.

The plaintiff in this action sues the second defendant (D2), the guarantor for a loan agreement cum assignment obtained by the first defendant (D1), the wife of D2. The property forming the security for the loan had already been auctioned off to the plaintiff, the highest bidder. The plaintiff claims against D2 the balance of the debt still due and owing.

The Counsel for D2 raised several points on behalf of the defence case. They were as follows:

1. That the plaintiff had failed to prove its claim. The person who attested the signature of D2 to the guarantee had passed away and therefore was not called as witness to prove that the guarantor had executed the guarantee document.
2. That there was no evidence D2 had requested the plaintiff to lend money to D1 as stated in the recital of the guarantee.
3. That although there is no provision for a demand to be made in the guarantee itself, D2 by reason of being the principal debtor is entitled to the benefit of the clause in the loan agreement which reads:

   > To repay to the [plaintiff] **on demand** the Loan...

4. That clause 2 of the guarantee stipulates a demand must be made for payment after the property which was the security under the loan was sold. No demand was in fact made to the guarantor.

5. That the phrase in clause 6 of the guarantee which reads "...nor shall his liability be affected by an **act, thing, omission or means**..." renders the guarantee void for uncertainty as it was not clear whose "act, thing, omission or means" refer to.
6. That the property which formed the security for the loan was not described in the guarantee or in the memorandum of charge.
7. That the sale of the property (the security under the loan) was not at the market price or at the best price obtainable.

Held:

[1] What the plaintiff had to prove will depend on what was pleaded in its statement of claim and what had been traversed in the defence. By contending that plaintiff has failed to prove the execution of the guarantee by the guarantor, the Counsel for defence is actually stating that the execution of the guarantee is denied in the amended defence. Para 3 of the amended defence reads:

> ... the 2nd defendant says he signed a guarantee in respect of a loan to the [1st defendant] but the 2nd defendant says he does not recall whether the loan transaction was the same one as alleged by the plaintiffs...

That D2 "cannot remember" whether the guarantee was the one he signed does not amount to a denial that he executed the guarantee. Therefore he has not expressly or impliedly or generally traversed the allegation that he had executed the guarantee. That being so, the plaintiff is relieved of the burden of having to prove the execution of the guarantee.

[2] The undisputed evidence in the case shows that had it not been for the securities amongst them, the guarantee which D2 signed at the request of the plaintiff, the loan would not have been released to D1. Therefore by signing and returning the guarantee to the plaintiff, D2 must have desired that the loan be given to his wife, i.e. D1. The loan granted thus at the desire of D2 constituted consideration for the guarantee.

[3] The ruling made in the case of *Borneo Housing Mortgage Finance Berhad v. Lee Shen Fong @ Joseph Francis*, (see [1994] 1 CLJ 247) is reiterated as regards the third argument of the defence counsel. When the defendant (guarantor) is not privy to the loan agreement, the defendant cannot claim the benefit of any of the terms in the loan agreement.

[4] The plaintiff through its solicitors had demanded payment from D2 under the guarantee on 11 June 1988 in respect of the monies then being owed by D1. An action was commenced and the property comprising the security for the loan was auctioned off on 8 April 1991. The plaintiff then amended his statement of claim to give credit to the proceeds of the sale by auction and now claims for a reduced amount, i.e. the balance after deduction of the proceeds together with interest. Where the defendant/guarantor is sued before the property is auctioned, (as in the present case) and the proceeds are insufficient to satisfy the debt, the plaintiff is not required to make a fresh demand for payment after the sale of the property.

[5] Reading clause 6 as a whole, it is clear that the emphasised words refer to the plaintiff; that the act, thing, omission or means are those of the plaintiff. There is no uncertainty in clause 6 as submitted by D2's Counsel.

[6] The contemporaneous documents for e.g. the letter of offer established clearly which specific property the plaintiff had in mind as regards the security for the loan. Counsel for defence has also failed to argue the relevance of s. 93 of the Evidence Act.

[7] Under clause 8 of the loan agreement the plaintiff was entitled to sell the property "at such prices and in such manner" as the plaintiff shall "in its absolute discretion think fit". The second defendant cannot therefore be heard to complain the sale was not at the market price nor at the best price obtainable.

[Obiter: The learned Judge also considered a point which both counsels failed to raise and this was on the effect of the inclusion of the guarantee in the agreed bundle of documents and of it being admitted as exhibits. His Lordship pronounced that D2 had through his Counsel not only agreed to the inclusion of the guarantee in the agreed bundle of documents but had done so without any reservation. D2 had by such conduct dispensed with proof of its execution**]**.

[Judgment for the plaintiff. Costs on a solicitor and client basis to be taxed].

Cases referred to:

John Lancaster Radiators Ltd. v. General Motor Radiator Co. Ltd. [1946] 2 All ER 685 ***(refd)***
Harris v. Gamble [1878] 7 Ch D 877 ***(refd)***
Rutter v. Tregent [1879] 12 Ch B 758 ***(refd)***
Henry Trading Co. Ltd. v. Harun [1966] 2 MLJ 281 FC ***(refd)***

Yap Choo Hoo v. Tahir bin Yasin & Anor. [1970] 2 MLJ 138 ***(refd)***
Chong Khee Sang v. Pang Ah Chee [1984] 1 MLJ 377 ***(refd)***
Borneo Co. (M) Sdn. Bhd. v. Penang Port Commission [1975] 2 MLJ 204 FC ***(refd)***
Hongkong and Shanghai Banking Corp. v. Syarikat United Leong Enterprise Sdn. Bhd. & Anor. [1993] 3 CLJ 419 / [1993] 2 MLJ 449 ***(refd)***
Borneo Housing Mortgage Finance Bhd. v. Lee Shen Fong @ Joseph Francis [1994] 1 CLJ 247 ***(refd)***

Legislation referred to:
Advocates (Practice and Etiquette) Rules 1988, r. 21(c)
Evidence Act 1950, s. 67, 93
Rules of the High Court 1980, O. 18 r. 13(1)
Rules of the Supreme Court, O. 18 r. 13 (UK)

Other sources referred to:
Atkin's Court Forms, 2nd Edn., Vol. 32 at p. 30
Sarkar on **Evidence**, 12th Edn., Vol. 1, at p. 581

For the plaintiff - David Fung; M/s. Alex Pang & Co.
For the defendant - Patricia Hiew; M/s. Chau & Thien

JUDGMENT

Ian H.C. Chin J:
This action concerns the plaintiff and the 2nd defendant. The plaintiff sues the 2nd defendant on a guarantee agreement dated 18 March 1983 ("guarantee") for the sum of RM270,336.20 and interest which sum was the amount still owing by the 1st defendant under a loan agreement cum assignment dated 18 March 1983 ("loan agreement"). At the close of the plaintiff's case, the 2nd defendant elected to submit that the plaintiff had failed to prove its claim. The evidence, including documents admitted by agreement as evidence and facts agreed to in a statement, are these.

The 1st defendant, who was the wife of the 2nd defendant, bought a warehouse from a developer under an agreement dated 14 October 1982. She applied for a loan from the plaintiff and the plaintiff by a letter dated 8 March 1983 (exhibit PB(15)) offered to lend the 1st defendant RM217,000 to help finance the purchase of the said warehouse subject to the condition, *inter alia*, that the repayment of the loan be guaranteed by the 2nd defendant. Wong Fui Cheng, an officer of the plaintiff, testified that a completed data form relating to the 2nd defendant was received after it was sent to the 1st defendant to enable her to procure the particulars and signature of the 2nd defendant. The 1st and 2nd defendant, according to this witness, signed and accepted the offer. This acceptance note, according to this witness, was later returned to the plaintiff together with the loan agreement and memorandum of charge. This acceptance note was not produced. She testified that it was after the receipt of these documents together with the duly signed guarantee that the plaintiff released the loan. She admitted in cross-examination that she had never met the 2nd defendant and she did not see the 2nd defendant sign the guarantee. Another witness for the plaintiff was an advocate, Ting E. Hang ("PW1"), who testified that he attested the signatures of the 1st defendant to the loan agreement and memorandum of charge. The last witness for the plaintiff was a valuer called Chang Fu Lin and he testified that the price of RM220,000 he recommended for the forced sale of the property which forms the security for the loan was fair and he gave a detailed explanation of how he arrived at that figure. The evidence showed that only the plaintiff had bid for the property at the price of RM220,000 and the plaintiff on 8 April 1991 bought the property at the said price. The present amount claimed by the plaintiff came about as result of an amendment to the statement of claim to take into account, by giving credit to the proceeds of, the sale of the said property and the interest accrued. Mr. David Fung, counsel for the plaintiff, made an unchallenged statement from the Bar that the person who attested the signature of the 2nd defendant to the guarantee had passed away and therefore could not be called as a witness. Reference was made to the loan agreement and the guarantee, which documents I will reproduce when I deal with the submissions of Counsel relating thereto. For the purpose of determining whether the plaintiff had proved its claim on a balance of probabilities, the pleadings will have to be looked into. The relevant part of the amended statement of claim reads:

> 5. By a letter of guarantee dated 18 March 1983 and for due consideration therein, the 2nd defendant agreed to guarantee the due payment of RM217,000 together with interest, penalties and other payment due to the plaintiffs by the [1st defendant].
> 6. Pursuant to the said [loan agreement], charge-in-escrow and [guarantee] the plaintiffs have released the said sum of RM217,000 to or for the benefit of the [1st defendant].
> 7. [The 1st defendant] defaulted in her payment ... and the plaintiffs through their solicitors, Messrs Alex Pang, Shim & Co., have by a letter dated 11 June 1988 ... demanded repayment...

8. ...On 18 April 1991, the said property was sold to the one and only tenderer for ... RM220,000.
9. Therefore the 1st defendant is.. indebted to the plaintiffs in the sum of RM270,336.20...
10. Despite demands... 1st defendant... refused to pay...
11. The 2nd defendant has also despite demands by the plaintiffs and their solicitors failed .... to settle his liabilities in accordance with the said guarantee.

In answer to the claim the 2nd defendant in his amended defence states:

3. As to paragraph..5 of the amended statement of claim the 2nd defendant says he signed a guarantee in respect of a loan to the [1st defendant] but the 2nd defendant says he does not recall whether the loan transaction was the same one as alleged by the plaintiffs in this action or whether the guarantee he signed was the one now sued upon by the plaintiffs.
4. Alternatively, if the guarantee signed by the 2nd defendant related to the loan transaction sued on in this action... the 2nd defendant says that the said guarantee was given on condition that should the memorandum of charge recited in the 2nd paragraph of the said guarantee executed by the [1st defendant]... be not registrable the said guarantee was to take effect from such event happening ...
5. Further or in the alternative, the 2nd defendant will contend that clause 6 of the said guarantee is void for uncertainty as it was not clear on the true construction thereof as to whose act, thing or omission shall effect or affect the 2nd defendant's liability as guarantor.
6. Further or in the alternative, the 2nd defendant denies that he has ever requested the plaintiffs to grant a loan to the [1st defendant] in the sum of RM217,000 as alleged in the recital of the said guarantee.
7. As to paragraphs 6 and 7 ... he had no knowledge of the alleged releases of loan and default of payment by the [1st defendant]...
8. The 2nd defendant has no knowledge of the matters alleged in paragraphs 8 and 9 of the amended statement of claim and makes no admission in respect thereof.
9. Further or in the alternative, the 2nd defendant avers that even if there was a sale or disposal of the said property by the plaintiffs ... the sale proceeds ... did not reflect or represent the market value ... at the time of its disposal and neither is the said sum of RM220,000 the best price that could be reasonably obtained by the plaintiffs for the said property at the time when they auctioned off the same.
10. The 2nd defendant further denies that the plaintiffs have served demands on him for the outstanding account as alleged in paragraph 11 of the amended statement of claim and by reasons whereof his liability under the said guarantee does not arise.

It was against the evidence and pleadings that I have set out that Ms. Patricia Hiew, counsel for the 2nd defendant, submitted that the plaintiff had failed to prove its claim on a balance of probabilities and the 2nd defendant elected not to call any evidence. What the plaintiff had to prove will depend on what was pleaded in its statement of claim and what had been traversed in the defence. Any allegation of fact made by a party in his pleading is deemed admitted by the opposite party unless it is traversed by that party in his pleading or unless there was a joinder of issue. See O. 18 r. 13(1) of the RHC 1980. A traverse in general form generally suffice. See *John Lancaster Radiators Ltd. v. General Motor Radiator Co. Ltd.* [1946] 2 All ER 685 where the court held that the traverse - "The defendants deny each and every allegation in the statement of claim contained as fully as if the same were herein set forth and denied *seriatim*" - was in order. But a traverse in the form - "the defendant puts the plaintiff to the proof of the several allegations in his statement of claim" - was held to be a contravention of O. 18 r. 13 of English RSC and the plaintiff was entitled to judgment on the ground that the allegations in the statement of claim must be taken to have been admitted (see *Harris v. Gamble* [1878] 7 Ch D 877). Similarly a defendant's plea - that he did "not admit the correctness of the statement set forth in paragraphs 1, 2, 3 and 6 of the plaintiff's statement of claim and required further proof thereof " - was held not to be proper traverse of the allegations to those paragraphs (see *Rutter v. Tregent* [1879] 12 Ch D 758). There is one other rule of pleading which it is relevant to remind myself and that is that though a defendant is entitled to plead any number of defences, whether in the alternative or cumulative, and even though obviously inconsistent, such distinct grounds of defence must be stated separately and distinctly and the defendant must not leave the plaintiff in doubt as to what he has admitted and what he has denied. See **Atkin's Court Forms**, 2nd Edn., Vol. 32, at p. 30. The first of the submissions on the part of Ms. Patricia Hiew was that the plaintiff must prove that the 2nd defendant executed the guarantee and this, she

contended, the plaintiff had failed to do. This means, though Ms. Patricia Hiew did not say so expressly, that she contended that the execution by the 2nd defendant of the guarantee was denied in the amended defence. Mr. David Fung submitted that the 2nd defendant had not by para. 3 of his amended defence denied the execution of the guarantee and that in any event there are evidence to suggest that the 2nd defendant did in fact sign the guarantee. The first of the issue appears to me to be whether the execution of the guarantee by the 2nd defendant was denied by the 2nd defendant in para. 3 of his amended defence which was reproduced, *supra*. The 2nd defendant began, in para. 3 of his amended defence, by admitting or "confessing" that he signed a guarantee but he attempted to avoid it by further saying that "he cannot recall whether the loan transaction was the same one as alleged by the plaintiffs in this action or whether the guarantee he signed was the one now sued upon by the plaintiffs". The 2nd defendant therefore had expressly admitted or "confessed" the execution of the guarantee pleaded in the statement of claim but he attempted to plead fresh fact to answer or "avoid" the legal consequence of the admitted execution of the guarantee. But what he "cannot remember" did not in any way qualify the admission or "confession" that the 2nd defendant had executed the guarantee. That he "cannot remember" whether the guarantee was the one he signed does not amount to a denial that he executed the guarantee. Therefore, the 2nd defendant had not anywhere in his said pleading, expressly or impliedly or generally, traversed the allegation that he had executed the guarantee. In fact the 2nd defendant had confessed to the execution of the guarantee. That being so, the plaintiff is relieved of the burden of having to prove the execution by the 2nd defendant of the guarantee since the execution had been admitted by it not being denied by the defence. There is one significant point which neither counsel addressed me and that is the fact of the guarantee forming part of the agreed bundle of documents and it being admitted as exhibit PE(36)-(39). The legal position of the guarantee forming part of an agreed bundle of documents was stated in *Henry Trading Co. Ltd. v. Harun* [1966] 2 MLJ 281 FC, at p. 282 to be that there is no need to prove the document. This Federal Court decision was questioned by Sharma J. in *Yap Choo Hoo v. Tahir bin Yasin & Anor.* [1970] 2 MLJ 138 but the criticism appears to have earned an immediate rebuke from the Chief Justice of Malaya when he issued Practice Note No. 3 of 1970 to negate the decision or criticism of Sharma J. See *Chong Khee Sang v. Pang Ah Chee* [1984] 1 MLJ 377 as to the issuance of further directions relating to the bundle of documents. The Chief Justice of Borneo had also issued a practice directive, Practice Note No. 1 of 1979, regarding documentary evidence in civil actions, clause 2 of which reads:

> 2. In most cases it is possible for advocates to agree on most of the documents to be tendered as evidence. The proper course in every such case is for copies to be prepared and made up in a proper bundle bound and paged in chronological order. This bundle is to be called **Agreed Bundle of Documents** which should contain all relevant documents, the authenticity of which is not disputed. The court does not have to see the originals at all. This would avoid the necessity of formal production of the original or copy thereof by any witness. The object of obtaining admission is to preclude the necessity of formally proving documents or facts admitted thus not only saving time and costs but also avoiding inconvenience. Any party unreasonably refusing or neglecting to admit any document or fact, when called upon to do so, whether in pursuant to a notice to admit or to agree the inclusion of any document in an **Agreed Bundle of Documents**, may be penalised for costs occasioned thereby.

Sarkar on Evidence, 12th Edn. Vol. 1, at p. 581 (cited in the case of *Borneo Co. (M) Sdn. Bhd. v. Penang Port Commission* [1975] 2 MLJ 204 FC, at p. 205) states:

> Documents are either proved by witnesses or marked on admission. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted, and cannot be challenged by cross-examination or otherwise. In case of documents marked on admission dispensing with formal proof, the contents are evidence, although the party admitting does not thereby accept the truth of the contents which can be challenged by cross-examination or otherwise (*Lionel Edwards Ltd. v. S.A.* [1967] C 191).
>
> Where documents were produced and not disputed, the Privy Council held that they should be received without proof) *Takai v. Beglar* 6 MIA 251; *Nanda Kishore v. Ram Kalpa* 6 BLR Ap. 49).

In the present case, the 2nd defendant through his counsel not only agreed to the inclusion of the

guarantee in the agreed bundle of documents but did so without any reservation. The 2nd defendant had by such conduct dispensed with its proof or with its proof of execution. See *Chong Khee Sang v. Pang Ah Chee*, cited *supra*. Therefore, I would also have held, if this aspect had been argued before me but unfortunately were not, that the guarantee and its execution had been proved. Had it not been for my decision, *supra*, I would have dismissed the plaintiff's claim as there is no evidence to show that the 2nd defendant had executed the guarantee. The signature on the guarantee which is alleged to be that of the 2nd defendant must be proved as required by s. 67 of the Evidence Act 1950 and there is no such evidence, either in the way of handwriting expert or of witnesses who are familiar with the signature of the 2nd defendant or of the attesting witness.

The next contention of Ms. Patricia Hiew was that there was no evidence that the 2nd defendant had requested the plaintiff to lend money to the 1st defendant as stated in the recital of the guarantee. The undisputed evidence adduced in this case show that the plaintiff would not have released the loan to the benefit of the 1st defendant had it not been for, among other securities, the guarantee which the 2nd defendant had signed after the plaintiff had requested for it as a condition for the loan to the 1st defendant. The 2nd defendant by signing and returning the guarantee to the plaintiff must have desired that the loan be given to his wife the 1st defendant. See *Hongkong and Shanghai Banking Corp. v. Syarikat United Leong Enterprise Sdn. Bhd. & Anor.* [1993] 3 CLJ 419; [1993] 2 MLJ 449. It is conceded by Mr. David Fung that there was no evidence that the 2nd defendant had requested the loan for the 1st defendant but he said that the loan was at the desire of the 2nd defendant and that constituted the consideration for the guarantee; that submission I uphold. Here again the court was not addressed as to whether a statement on the guarantee that the loan was at the request of the 2nd defendant can be contradicted by any evidence tending to show otherwise. In the end it does not matter because the evidence shows that there was another consideration for the guarantee and that was the loan was at the desire of the 2nd defendant. Evidence of this other consideration is admissible. See *Hongkong & Shanghai Banking Corp. v. Syarikat United Leong Enterprise Sdn. Bhd. & Anor. supra.* There was also no objection to the admission of such evidence and Ms. Patricia Hiew did not bother to reply to the submission of Mr. David Fung; there was consideration for the guarantee, *albeit* not the one stated in the guarantee.

The next argument advanced by Ms. Patricia Hiew was that, the 2nd defendant being deemed by cl. 6 of the guarantee to be the principal debtor must be entitled to the benefit of any term in the loan agreement (exhibit PC(16)-(27)) made between the plaintiff and the 1st defendant and particularly cl. 1(1) of the loan agreement which reads:

> 1. ... [1st defendant] ... Hereby Agrees Covenants And Undertakes:
>
> (1) To repay to the [plaintiff] on demand the Loan ...

Ms. Patricia Hiew argued that cl. 1(1) of the loan agreement provides for a condition precedent, which is that a demand must be made for repayment before the loan needs be repaid. She argued that though there is no provision for a demand to be made in the guarantee, the 2nd defendant is entitled to the benefit of the said cl. 1(1) even though the loan agreement was made between the 1st defendant and the plaintiff by virtue of the 2nd defendant being deemed a principal debtor. I have already dealt with this issue in *Borneo Housing Mortgage Finance Berhad v. Joseph Francis* [1994] 1 CLJ 247, where I said:

> Since the defendant was not privy to the Loan Agreement, I cannot see how the defendant can claim the benefit of any of the terms in the Loan Agreement. It is also not one of those rights given to a surety by the Contracts Act, 1950.

The same can be said of the present case. There is also no merit in this contention of Ms. Patricia Hiew. The next contention of Ms. Patricia Hiew was that there was no demand for payment after the property was sold and she contended that the demand is required by cl. 2 of the guarantee which reads:

> In the event of the [plaintiff] exercising its right of sale in respect of the property pursuant to the security document then should the proceeds of such sale after deducting all the expenses thereof and incidental thereto (hereinafter called "the net proceeds") be insufficient to pay all the monies due and owing to the [plaintiff] by the [1st defendant] the [2nd defendant] shall, at the request of the [plaintiff], forthwith pay to the [plaintiff] a sum

representing the difference between the net proceeds and the monies then due and owing to the [plaintiff].

A little of the facts have to be re-stated for a better understanding of this argument. The plaintiff by its solicitors' letter dated 11 June 1988 (exhibit PH(42)) demanded payment from the 2nd defendant under the guarantee in respect of the money then owing by the 1st defendant. The demand was for a sum of RM320,835.26 plus interest. The writ was subsequently on 1 July 1988 issued. The property, which was a security for the loan to the 1st defendant, was thereafter on 8 April 1991 disposed off for the sum of RM200,000. The plaintiff on 7 September 1993 amended the statement of claim in order to give credit to the 2nd defendant in respect of the proceeds of the sale. The claim of the plaintiff, as a result of the amendment, is now for the sum of RM270,336.20 together with interest at the rate of 14% per annum from 10 May 1991 to the date of payment. I have also dealt with this issue in *Borneo Housing Mortgage Finance Berhad v. Lee Shen Fong @ Joseph Francis* case *(supra).* To construe cl. 2 of the guarantee in the manner advocated by Ms. Patricia Hiew would have the result that the plaintiff having properly demanded payment and thereafter having properly commenced action for a proper amount of money has now to re-demand payment and to re-commence action for recovery of the money just because the plaintiff was honest enough to inform the court that the property, after the commencement of the action herein, had been sold and had thus reduced the amount of the liability of the 2nd defendant. This surely cannot be what the parties had intended. Clause 2 of the guarantee envisages two situations - one where the 2nd defendant is sued after the property had been auctioned and the proceeds are insufficient to satisfy the loan and the other, where the 2nd defendant is sued before the property is auctioned. In the former case, the plaintiff would have to make a request for payment before he can commence action and not in the latter case. I therefore rule that there is no need for a fresh demand for payment after the sale of the property.

Is there any uncertainty in cl. 6 of the guarantee? This was the next argument of Ms. Patricia Hiew. She submitted that it is not clear from the wordings of cl. 6 as to whose act or thing that affect the 2nd defendant's liability as a guarantor and because of this the whole guarantee is void for uncertainty. Clause 6 of the guarantee says:

> 6. Without prejudice to any right of the [2nd defendant] against the [1st defendant] as principal debtor the [2nd defendant] as between himself and the [plaintiff] shall be deemed to be a principal debtor and not merely as a surety and accordingly shall not be discharged nor shall his liability be affected by any **act, thing, omission or means** whatever whereby his liability would not have been discharged if he had been a principal debtor and in particular (but not by way of limitation) the [plaintiff] shall have the fullest liberty without affecting this guarantee to postpone for any time or from time to time the exercise of any of the powers conferred by this security document or by law in the event of the [1st defendant] committing any default in complying with its terms and to exercise the same at any time and in any manner and either to enforce or forbear to enforce the covenants for payment of principal or interest or any other covenants, agreements, conditions or stipulations contained or implied in the security document or any other remedies or securities available to the [plaintiff] and the [2nd defendant] shall not be released by any exercise by the [plaintiff] of its liberty with reference to the matters aforesaid or any of them or by being given to the [1st defendant] his personal representatives or assigns or by any variation in the provisions of the security document or re-arrangement of the terms of repayment of the loan or by any other thing whatsoever which under the law relating to sureties would but for this provision have the effect of so releasing the [2nd defendant].

It was argued that it is not clear as to whose "act, thing, omission or means", those underlined words of cl. 6, *supra*, refer to. I agree with Mr. David Fung that reading cl. 6 as a whole, those words refer to the act, thing, omission or means of the plaintiff. I do not see any uncertainty at all and Ms. Patricia Hiew also did not expound on her submission which was in one sentence. There is also no substance in this submission.

Ms. Patricia Hiew next submitted that the property, which formed the security for the loan, was not described in the guarantee or the memorandum of charge and thus "raises a doubt as to what or which property the plaintiff is referring to". Here again, counsel never explained or expound how such omission can affect the guarantee or the liability of the 2nd defendant. The guarantee and memorandum of charge

contained blanks which were meant to be filled up but were not. The blank in the guarantee is like this:

> Whereas the [plaintiff] at the request of the [2nd defendant] has agreed to lend to [the 1st defendant] the sum of Dollars Two hundred and seventeen thousand only ($217,000) upon the security of a memorandum of charge (hereinafter called "the security document") executed by the [1st defendant] dated the ____ day of ___ one thousand nine hundred and ____ (19__) in respect of the land and premises held under or comprised in _____

The underlinings show the places where the date and the title number of the property were supposed to be inserted but were not. These particulars were also not filled in the memorandum of charge. The contemporaneous documents, like the letter of offer (exhibit PB(15)), established that the property concerned was Lot 1, Block A, Taman El-Nysa, Tawau. PW1 gave evidence in court that the blanks could not be inserted until after the subdivided titles is issued. These evidence were not objected to by Ms. Patricia Hiew and she also did not reply to the submission of Mr. David Fung that the evidence explained the blanks. Ms. Patricia Hiew did not reply to the submission and I take it she had conceded the point. I will also assume that s. 93 of the Evidence Act 1950, which excludes evidence to explain a defective language in a document, does not apply since Ms. Patricia Hiew did not submit that it applies to this case.

It was next submitted by Ms. Patricia Hiew that the guarantee is to take effect only when the memorandum of charge is not registrable and that, according to her, is laid down in cl. 9 of the guarantee which reads:

> 9. The [2nd defendant] hereby agrees and confirms that, if the security document referred to in the recital to this [guarantee] is not a registered or registrable memorandum of charge and [the 1st defendant] subsequent to the date of this [guarantee] and in compliance with the provisions of the security document by himself or by his attorney executes a memorandum of charge in favour of the [plaintiff] in substitution for the security document, this [guarantee] shall bind [the 2nd defendant] to guarantee the due performance by the [the 1st defendant] of his obligations under such memorandum of charge and all references herein to "the security document" shall thereafter be construed as referring to such memorandum of charge.

She submitted that there is no evidence that the memorandum of charge is not registrable and therefore the guarantee does not come into effect as yet; the 2nd defendant is therefore not liable under the guarantee. Here also, she never did expound how the words of cl. 9 of the guarantee can be interpreted to mean the way she had submitted. Clause 9 merely provides for the words "security document" to refer to the memorandum of charge already stated in the recital of the guarantee or to any other memorandum of charge in substitution therefore for reason of the stated memorandum of charge being not registered or being not registrable. No matter how you juggle the words around, syntax or otherwise, you still cannot come to the interpretation that Ms. Patricia Hiew had put on the words of cl. 9. Her submission is devoid of substance.

Ms. Patricia Hiew's final submission was in relation to the contention in para. 9 of the amended defence which is that the sale of the property was not at the market price or the best price obtainable. The short answer of Mr. David Fung, which I agree, was that the plaintiff was, under cl. 8 of the loan agreement, entitled to sell the property "at such prices and in such manner" as the plaintiff shall "in its absolute discretion think fit" and the 2nd defendant cannot be heard to complain that the sale was not at the market price or at the best price obtainable. The property was advertised for sale at the forced sale price of RM220,000 recommended by a valuer and the plaintiff bought the property at that price when there were no bidders. Ms. Patricia Hiew also submitted that the plaintiff had shut out or denied other people from tendering for the property but she did not continue with this submission when I asked her to show me the evidence that the plaintiff had shut out or denied other people from tendering for the property. I think it is not out of place here to remind counsel that "it is improper for an advocate in argument, to assert as a fact that which had not been proved" (see r. 21(c) of the Advocates (Practice and Etiquette) Rules 1988).

Given that the 2nd defendant had, for the reasons stated above, failed in his submission that the plaintiff had failed to prove its case, I order that judgment be entered for the plaintiff against the 2nd defendant for the sum of RM270,366.20, together with agreed interest on the sum of RM270,336.20 at the rate of 14% per annum from 10 May 1991 to the date of payment and costs on a solicitors and client basis to be taxed.